No. 91-583

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

HUGH H. BOSWORTH, JR., et al.
Petitioners

V.

TIMOTHY J. LEATHERS, Commissioner of Revenues; et al.
Respondents

ARKANSAS TELEPHONE ASSOCIATION, INC.
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER § 2 OF ACT 27 OF 1987 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY EXCLUDING FROM THE GROSS RECEIPTS TAX WIDE AREA TELECOMMUNICATIONS SERVICE (WATS) OR SIMILAR SERVICE WHILE SUBJECTING "REGULAR" (MTS) INTERSTATE LONG DISTANCE TELEPHONE SERVICES TO THE TAX.

II.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN FOUR SPECIAL "APPOINTED" ASSOCIATE JUSTICES REFUSED TO RECUSE UPON A REQUEST, BY PETITIONERS, FOR RECUSAL WHICH ALLEGED THE APPEARANCE OF IMPROPRIETY AND QUESTIONED THE SPECIAL JUSTICES' IMPARTIALITY AND INDEPENDENCE.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

REASONS FOR DENYING THE PETITION

I. NO CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF OTHER STATE COURTS OF LAST RESORT IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES IMPOSED UPON TELEPHONE SERVICES AND THE SUPREME COURT OF ARKANSAS FULLY CONSIDERED AND DECIDED THE ISSUES 4

II. THE PETITION WAS FILED ON SEPTEMBER 27, 1991, MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION FOR RECONSIDERATION OF RECUSAL AND DISQUALIFICATION OF JUSTICES (DECEMBER 10, 1990) (PET. 14a) AND MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION (1) SUGGESTING DISQUALIFICATION OF

TABLE OF CONTENTS

Page

ALL APPOINTED "SPECIAL JUSTICES", (2) FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR, ALTERNATIVELY, (3) FOR OTHER RELIEF (APRIL 15, 1991) (PET. 26a) AND THE PERIOD FOR APPLYING FOR A WRIT OF CERTIORARI HAS NOT BEEN EXTENDED BY A JUSTICE OF THIS COURT 16

III. THE DECISIONS OF THE SUPREME COURT OF ARKANSAS DENYING PETITIONERS' MOTIONS FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION OF JUSTICES (DECEMBER 10, 1990) AND SUGGESTING DISQUALIFICATION OF ALL APPOINTED "SPECIAL" ASSOCIATE JUSTICES, FOR RECONSIDERATION OR RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR ALTERNATIVELY, FOR OTHER RELIEF DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT 17

CONCLUSION 25

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Insurance Co. v. Lavoie, 457 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986) 22, 23, 24

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959) 13

Amax Magnesium Corp. v. State Tax Commission, 796 P.2d 1256 (Utah, 1990).....8

Associated Grocers, Inc. v. State, 787 P.2d 22 (Wash., 1990), *cert. denied, Washington v. Associated Grocers, Inc.*, 111 S.Ct. 670 (1991) 8

Blue Cross and Blue Shield v. State, 779 P.2d 634 (Utah 1989).....8, 9

Carmichael v. Southern Coal Co., 301 U.S. 495 (1937) 13

City of Little Rock v. Waters, 303 Ark. 363, 797 S.W.2d 426 (1990) 12, 13

City of New Orleans v. Dukes, 424 U.S. 297 (1976) 14

Department of Banking v. Pink, 317 U.S. 264 (1942) 16, 17

GTE Sprint Communications Corp. v. Wisconsin Bell, Inc., 454 N.W.2d 797 (Wis., 1990) 5, 6, 10

Gibson v. Berryville, 411 U.S. 564, 36 L.Ed.2d, 93 S.Ct. 1689 (1973).....23

Goldberg v. Sweet, 488 U.S. 252, 102 L.Ed.2d 607, 109 S.Ct. 582.....10

TABLE OF AUTHORITIES

CASES: Page

In Re Murchison, 349 U.S. 133 (1955) 23, 24

Leathers v. Medlock, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) 4, 5, 10

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 495 U.S. ___ , 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990) 17, 18

Mercantile National Bank of Langdeau, 371 U.S. 555 (1963) 17

Northern Natural Gas Co. v. Board of Equalization and Assessment, 443 N.W.2d 249 (Neb., 1989) 7, 8, 9

Pledger v. Bosnick, 306 Ark. 45, 811 S.W.2d 286 (1991), United States Supreme Court No. 91-375, Filed September 3, 1991 20

Satellink of Chicago v. City of Chicago, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).....6, 7

Streight v. Ragland, 280 Ark. 206, 655 S.W.2d 459 (Ark., 1983) 12

Tumey v. Ohio, 273 U.S. 510 (1927) 23

United States v. Will, 449 U.S. 200 (1980) 21, 23

Ward v. Village of Monroeville, 409 U.S. 57 34 L.Ed.2d 267, 93 S.Ct. 80 23

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS:

Federal:

Fourteenth Amendment, § 1 ..... passim

State:

Art. 7, § 9 20

MISCELLANEOUS:

Act 27 of 1987 (Ark.) ..... passim

Arkansas Code of Judicial Conduct

Canon 3 ..... 20, 21

Canon 7 ..... 19, 21

Addendum 21

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ARKANSAS TELEPHONE ASSOCIATION, INC.
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENTS' BRIEF IN OPPOSITION

Timothy J. Leathers, Commissioner of Revenues, State of Arkansas; Jimmie Lou Fisher Lumpkin, Treasurer of the State of Arkansas; Floyd G. "Buddy" Villines, III, County Judge, Pulaski County, Arkansas; Patricia Tedford, Treasurer, Pulaski County, Arkansas; Pulaski County, Arkansas; and the City of Fayetteville, Arkansas, respectfully request this Court to deny the Petition for Writ of Certiorari filed by the Petitioners Hugh H. Bosworth, Jr., Walter Henningsen, Melissa Henningsen, Irene E. Scott and Henningsens, Incorporated seeking review of the Supreme Court of Arkansas' opinion in this case. That opinion is reported at 305 Ark. 598, 810 S.W.2d 918.

STATEMENT OF THE CASE

Respondents feel compelled to point out discrepancies between petitioners' Statement of the Case and the Findings of Fact (Pet. 21a) of the Chancellor.

Although petitioners allege that there are "no longer dedicated transmission lines for WATS services; (Pet. 6), the Findings of Fact, number 4, indicates the service may be over dedicated or non-dedicated lines. (Pet. 22a)

Petitioners allege that both MTS and WATS services are billed based upon time of day, day of week, length of time used and distance. (Pet. 6) Finding of Fact, number 4, states "Instead of incurring charges on a per-call, per-minute basis, the WATS subscriber is charged a flat rate for the service." (Pet. 22a)

Further, MTS and WATS do not use exactly the same type of facilities and there are differences other than in the rates charged. The record establishes that the technology behind each type of service is distinguishable. The method for placing the call, i.e. direct dialing, operator assistance or calling card, also affects MTS services. Anyone may call an MTS customer.

Additional technology, such as geographical bands and call screening, is used in WATS. (R. 707) There are two basic WATS services — Outbound WATS and Inbound WATS (800 service). Outbound WATS permits subscribers to call within a specific geographic band. Any calls outside this band are screened and charged as an MTS call. Operator assisted calls, collect calls or calling card calls are charged as MTS calls. Inward WATS or 800 Service only permits incoming calls from those in specific geographic areas. All other calls would

be MTS. Those outside the band could not use this service. Private Line Services are also distinguishable.

Footnote 4, Pet. 7, is from the petitioners' brief to the Supreme Court of Arkansas. A comparison of this with the Findings of Facts (Pet. 7) reveal several discrepancies.

The so-called "unfair competitive disadvantage" is addressed *infra,* as is the comment made by the Chancellor. The sessions of the Arkansas Legislature are not reported, and any comments thereto cannot be official comments.

SUMMARY OF THE ARGUMENT

There is no basis for granting the Petition for a Writ of Certiorari to the Arkansas Supreme Court in this case. First, petitioner cites only one "comparable" case for the proposition that there exists a conflict between the decision of the Supreme Court of Arkansas and decisions of other state courts of last resort, and that decision is readily distinguishable on its facts. All other cases cited are equally distinguishable. The issues raised are not important enough to warrant review. The Supreme Court of Arkansas fully considered the equal protection standards enumerated in this Court's prior decisions and correctly decided this case. There are numerous reasons that the recusal issue raised by petitioners does not warrant consideration. First, the Writ was not timely filed. Secondly, the petitioners' right to due process has not been violated. In addition, prior decisions of this Court are not in conflict with the decision herein.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

NO CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF OTHER STATE COURTS OF LAST RESORT IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES IMPOSED UPON TELEPHONE SERVICES AND THE SUPREME COURT OF ARKANSAS FULLY CONSIDERED AND DECIDED THE ISSUES.

Petitioners state at page 17 of its Petition, footnote 7,

> However, the Plaintiffs do note that this Court has already acknowledged the seriousness of a possible Equal Protection violation in this type of situation because the Equal Protection issue was remanded in *Medlock*.

Respondents agree that rights granted under the equal protection clause are important in this case, as well as in all matters. This Court did not, however, discuss the equal protection clause in the light petitioners have stated. The case was remanded because the equal protection issue was raised but not decided in the Supreme Court of Arkansas. The Court made its findings based upon First Amendment grounds.[1]

---

[1]Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. . . . The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That Court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand. *Leathers v. Medlock*, 111 S.Ct. 1438, 113 L.Ed.2d 494, 508 (1991).

No further direct reference to the equal protection clause is made in *Leathers v. Medlock*, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991).

Another area of the Petition which requires comment concerns petitioners' statement that

> . . . Act 27 of 1987 fails the two-part "rational basis test" . . . because there is neither a legitimate state purpose served by (1) merely encouraging the high volume usage of interstate telephone service, or (2) creating a competitive pricing advantage for "facility based IXCs" over their "reseller" competitors. (Citations Omitted)

Pet. 17.

Neither the Chancery Court nor the Supreme Court of Arkansas found that the exclusion of WATS or WATS-like services created a pricing advantage to one type of telecommunications provider over another provider. Petitioners did not raise any issue of discriminatory treatment of resellers in the trial court. Indeed, the reseller telecommunications provider was a defendant below.

a. Conflicts with Decisions of other State Appellate Courts

The decision of the Supreme Court of Arkansas does not conflict with *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990). These two cases are clearly distinguishable based upon the laws of the two states and the attendant facts. It should be noted that petitioners admit the *GTE Sprint* case is

> . . . the *only* comparable reported case addressing the question presented in this litigation.

Pet. 18.

Since the two cases are clearly distinguishable and there are no other comparable cases, the petition should be denied for the lack of conflict among other state courts of last resort.

The Wisconsin tax on the transfer of access services applied when the purchase was made by an inter-LATA carrier but not to the same purchase by a local exchange carrier or a reseller. All subscribers to "regular" or MTS services are taxed by the Arkansas statute and all subscribers to WATS or WATS-like services are not taxed. Both types of services are available to any customer with no eligibility requirement. (Private line services, which petitioners are not questioning here, are also available without any eligibility requirements.)

Petitioners have alleged that the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1. Dist., 1988) is in direct conflict with the Equal Protection analysis in this case.

Satellink challenged a Chicago amusement tax ordinance which provided for an expansion of the tax to subscription and cable television but which specifically excluded from the tax entities with whom Chicago had or would enter into a franchise agreement. The franchised cable systems paid a 5% gross receipts tax. The circuit court found the tax unconstitutional based upon first amendment grounds, but the appellate court indicates it made its decision on the basis of the equal protection clause.

Although petitioners state that the court found the

ordinance had no rational basis, it appears the decision is based upon the strict scrutiny and compelling interest standards and not the rational basis standard:

> The present case is controlled by application of equal protection analysis, in connection with first amendment interests.

523 N.E.2d 15.

A further indication that this case was not based on the rational basis test is found at 523 N.E.2d 17:

> No compelling government interest has been shown which justifies such action. Neither raising revenue nor equalizing the financial burden on cable television can support the targeting of subscription television.

The First Amendment analysis of the court in *Satellink* is similar to that in *Medlock, supra.* This Court held that the taxation of cable television services alone, or cable and satellite services, while exempting the print media, did not violate the First Amendment. When the First Amendment considerations are laid aside, very little analysis is left in *Satellink.*

The facts in *Satellink* are clearly distinguishable. Further, that case does not utilize the rational basis test in determining whether the equal protection clause has been violated.

Additional cases cited in footnote 9 of the Petition as being in conflict with the opinion of the Supreme Court of Arkansas in this case, where allegedly "objective" standards were applied are: *Northern Natural Gas Co. v. Board of Equalization and Assessment,* 443 N.W.2d 249 (Neb., 1989);

Amax (sic) *Magnesium Corp. v. State Tax Commission*, 496 P.2d 1256 (Utah, 1990); and *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash., 1990), *cert. denied, Washington v. Associated Grocers, Inc.*, 111 S.Ct. 670 (1991).

In *Associated Grocers, supra*, wholesalers and distributors were taxed the same, but distributors were granted an exemption if the wholesaler from whom they made purchases paid the tax. The parties agreed that minimal scrutiny or the rational basis test was to be used. The court held that there was only one class of taxpayers, and since the members within that class were treated differently, there was no need to inquire further. Therefore, the court did not consider whether the classification had any relationship to the purposes of the statute. No references are made to the "objective" standards.

County assessments of property were made at eighty percent of value while state assessments of property were made at one hundred percent of value in *Amax, supra*. The court considered only the state constitutional question and not a federal question. No "objective" standards required by this Court were applied. The Utah Court found that the purpose of the statute was to equalize the tax burdens, and that there was no reasonable relationship between this statutory purpose and the classification. The case turned on the fact that the same assessment method was used by both assessors and that the purpose for the twenty percent county reduction was because the use of the cost appraisal method overvalued property. The court quoted a Utah case, *Blue Cross and Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989):

> in order to establish a violation of the equal protection component of the Utah Constitution

> with regard to taxation, a party must demonstrate that a law creates certain classes of persons and that the law is applied differently to each classification without a reasonably related legitimate government purpose.

The court here found a legitimate government purpose.

In *Northern Natural Gas, supra,* a request was made for "equalization of centrally assessed property." Enron, the parent company of Northern Natural Gas, requested this equalization based largely upon three U.S. District Court of Nebraska decisions. Three railroad companies challenged the property tax laws of Nebraska based upon discrimination under the Railroad Revitalization and Regulatory Reform Act of 1976, and they were successful. Enron requested that its property taxes be lowered to the level required by the District Court in the railroad cases. The taxes were equalized, although Nebraska statutes provided otherwise. The court found that the state by complying with the federal mandates denied Enron equal protection. The facts of this case are not even remotely similar to those before this Court.

Petitioners have cited no cases which indicate that the decision of the Supreme Court of Arkansas conflicts with decisions of other state courts of last resort. No such conflicts exist, and this case was correctly decided.

b. The Issue Is Not Important Enough to Warrant Review.

Petitioners are asking this Court to issue an advisory opinion on the application of the equal protection clause to taxation of new types of electronic communication services.

Yet, they have failed to show the extent of equal protection issues regarding the taxation of those services. For instance, only the statutes of two states are cited as taxing MTS services but not WATS services. It would be virtually impossible for this Court to provide guidance concerning every possible statutory scheme involving electronic communication services.

Medlock, supra, which involved the taxation of cable and satellite television subscription services, was decided by this Court on First Amendment grounds, and the case was remanded to the Supreme Court of Arkansas to address the equal protection question which had not been reached by that court.

Although the taxpayers in *Goldberg v. Sweet,* 488 U.S. 252, 102 L.Ed.2d 607, 109 S.Ct. 582 (1989) had raised equal protection and due process questions in the lower courts, those arguments were abandoned in its appeal to this Court. That case involved the five percent tax Illinois had placed on interstate long distance telephone calls. No commerce clause violation was found to exist. It was found that Ark. Code Ann. § 26-52-301(3) (Supp. 1987) satisfied the nexus test so that an interstate telephone call could be taxed.

The Wisconsin court in *GTE Sprint, supra* did not hold that any company was "placed at an unfair competitive disadvantage," as alleged by petitioners. Likewise, this issue was not raised below in this case.

The Supreme Court of Arkansas has properly determined that the equal protection clause was not violated in this case.

Petitioners have not raised an issue here which requires

review of this Court. Numerous other cases involving equal protection provide guidance concerning the taxation of electronic communication services, and this case does not rise to the level of importance required for review by this Court.

c. The Supreme Court of Arkansas fully considered the equal protection standards enumerated in this Court's prior decisions and correctly decided this case.

The fact that three cases challenging the imposition of state or local taxes based upon the Equal Protection Clause have resulted in upholding of those statutes reflects that

> great deference and wide latitude will be given by the Court to the state legislatures' decisions to create different classifications of taxpayers to meet local economic and regulatory needs; that the classifications will be presumed constitutional and approved if the Act advances a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; that the classifications do not have to be drawn with mathematical precision; and, finally, that a heavy burden of proof is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. (Citations Omitted)

Pet. 16.

However, the Arkansas Supreme Court has *not* indicated in these three cases that it must "hypothesize" a legitimate basis that the legislature "could have considered" in these taxing statutes, as petitioners have alleged. (See Pet. 22) The

court did not reach the rational basis question in *City of Little Rock v. Waters*, 303 Ark. 363, 797 S.W.2d 426 (1990), because it determined there were no impermissible classifications. Therefore, no "hypothesizing" occurred in *Waters*. The court in *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), carefully articulated its view on "hypothesizing" when it stated:

> In any event, the judiciary is allowed to hypothesize and we now reach a conceivable basis for the exemptions which we conclude are rational, reasonably distinctive and not arbitrary.
>
> 655 S.W.2d 464.

It added:

> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discover the *actual* basis for the legislation. Our task is merely to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose. Since we can reasonably conceive of lawful purposes for the state's classification scheme, it may not be held to have been arbitrarily enacted. (Emphasis the Court's.)

Id.

Therefore, the *Streight* court very carefully considered the standards set forth in prior cases of this Court. Likewise, the Arkansas Supreme Court in the case at hand applied the proper standards and reached the correct decision. Neither

Waters nor *Streight v. Ragland*, cited *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937). However, the court in this case cited *Carmichael v. Southern Coal Co.*, after it had stated:

> A state has wide latitude in the exercise of its power of taxation. The power to tax necessarily implies the power to discriminate in taxation. The law does not dictate that taxing measures be applied to all members of a class or none. Distinctions are permissible, and if there is any conceivable set of facts to uphold the law's rational basis, it will be upheld. . . .

Pet. 12a.

The court did state it was "allowed to hypothesize the facts giving rise to the classification". *Id.*

This Court in *Carmichael, supra*, did not "hypothesize" although it stated:

> It [legislature] may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

Petitioners have cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959) to bolster their "objective" standard argument. However, this Court may be deemed to have "hypothesized" in that case.

The Arkansas Supreme Court went further to emphasize that its "task is to protect against classifications which are arbitrary and without reason". (Pet. 13a) It indicated that it has not abandoned this Court's standards when it quoted

City of New Orleans v. Dukes, 424 U.S. 297 (1976) for the proposition that it is "only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment". *Id.*

Petitioners have "submitted" that the Arkansas Supreme Court did not apply the second part of the rational basis test, namely, whether the classification was rationally related to the state's purpose. A reading of the opinion indicates otherwise. The court logically proceeded in its analysis by answering three questions:

> (1) Does the imposition of the tax discriminate against or among individuals?
>
> (2) If so, what standard is to be applied in testing the legitimacy of the law, a "rational basis" standard or one which requires the showing of a compelling state interest?
>
> (3) And, finally, does the statute meet the requisite standard? (Pet. 7A)

The court found a disparate treatment among "regular" long distance subscribers and WATS subscribers and held that the rational basis test was to be applied. *Id.* It then stated:

> The appropriate analysis, therefore, is whether there exists for the classification any rational basis which provides a "deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose. (Citation omitted.)

Pet. 11a.

Therefore, the court viewed the classification in light of the rational basis for the legislation.

It appears that petitioners argue the small versus large customer in one breath, i.e. only "big business" can afford WATS or WATS-like services, and argue in the next breath that, if the legitimate state purpose was providing tax incentives to encourage business to stay and locate in this state, the legislature would have created two classifications —residential, which was taxed, and business, which was not taxed. Although petitioners argue that only large volume users subscribe to WATS or WATS-like services, no such evidence was submitted to the trial court. Therefore, the record does not reflect a distinction between low and high volume users.

"Telephone service is not telephone service is not telephone service." Even though the major and most apparent difference in basic interstate telephone service and WATS or WATS-like services may be in the rate structure, there are differences in transmission facilities, etc. Petitioners' "bootstrap" classification and "lack of mathematical precision exception" are misinterpretations of the case law cited. The statute is *not* based upon rate structure. Since petitioners have indicated they do not question the third category of service, private line services, they ignore the fact that the statute is based upon the type of services not rate structure. Differences in these three types of services existed at the time the legislation was passed, and these distinctions continue today.

Petitioners ask this Court to "accept the trial judge's invitation to reverse her decision". (Pet. 53a) Logically, a trial judge would not render a decision she believed to be

erroneous. The record, as a whole, and the Findings of Fact, Conclusions of Law, Order and Judgment of the Chancellor (Pet. 18a) reflect that a rational basis exists for the difference in tax treatment. Therefore, petitioners' invitation should be rejected.

II.

THE PETITION WAS FILED ON SEPTEMBER 27, 1991, MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION FOR RECONSIDERATION OF RECUSAL AND DISQUALIFICATION OF JUSTICES (DECEMBER 10, 1990) (PET. 4a) AND MORE THAN NINETY DAYS AFTER THE ORDER OF THE ARKANSAS SUPREME COURT DENYING APPELLANTS' MOTION (1) SUGGESTING DISQUALIFICATION OF ALL APPOINTED "SPECIAL JUSTICES", (2) FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR, ALTERNATIVELY, (3) FOR OTHER RELIEF (APRIL 15, 1991) (PET. 16a) AND THE PERIOD FOR APPLYING FOR A WRIT OF CERTIORARI HAS NOT BEEN EXTENDED BY A JUSTICE OF THIS COURT.

Petitioners have admitted that "there is no other appeal from a refusal by a majority of a state appellate court to recuse at the request of one of the litigants." (Pet. 26) The denial of petitioners' motions were final judgments and more than ninety days passed before the Petition for a Writ of Certiorari was filed. Therefore, the Petition should be denied.

The order of the Supreme Court of Arkansas met the requirements set forth in *Department of Banking v. Pink*,

317 U.S. 264 (1942) because it "fully adjudicated rights and that that adjudication is not subject to further review by a state court".

The Supreme Court of Arkansas issued more than one judgment in this case. The due process argument raised concerning the "appointed" special justices is a completely separate subject from the equal protection controversy which surrounds Act 27 of 1987, and the judgments entered on December 10, 1990 and April 15, 1991 were final. *Mercantile National Bank of Langdeau*, 371 U.S. 555 (1963).

Therefore, this Court lacks jurisdiction in this matter and the Petition should be denied.

III.

THE DECISIONS OF THE SUPREME COURT OF ARKANSAS DENYING PETITIONERS' MOTIONS FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION OF JUSTICES (December 10, 1990) AND SUGGESTING DISQUALIFICATION OF ALL APPOINTED "SPECIAL" ASSOCIATE JUSTICES, FOR RECONSIDERATION OF RECUSAL OR DISQUALIFICATION BY ELECTED JUSTICES, OR ALTERNATIVELY, FOR OTHER RELIEF DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

a. Petitioners Have Erroneously Applied This Court's Ruling in *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990) to The Facts of This Case.

Petitioners have quoted a portion of a statement from *McKesson, supra*, in an attempt to make the Due Process

Clause of the Fourteenth Amendment applicable to the refusal of Special Associate Justices to recuse, pursuant to petitioners' request. The holding in *McKesson, supra,* was very narrow and is not applicable to the facts here.

This Court in *McKesson, supra,* recognized that a state may choose a "predeprivation process", such as a suit to enjoin the collection of taxes prior to their payment. This method meets the "procedural safeguard" against unlawful exactions and satisfies the due process requirements.

The Court indicated, however, that a state is not required to provide this predeprivation process, but, if a state requires a taxpayer to object to a tax in a postdeprivation refund action, as did Florida in *McKesson, supra,* the state must provide taxpayers a "fair opportunity to challenge the accuracy and validity of their tax obligation". *Id.* 110 L.Ed.2d 37.

Arkansas law gives taxpayers an opportunity to challenge tax laws prior to the payment of tax through illegal exactions cases. This case was brought as a class action to enjoin, as an illegal exaction, the collection of taxes on basic interstate long distance services. Therefore, petitioners had a remedy other than a postdeprivation refund action, and the rationale and ruling in *McKesson, supra,* are not applicable here.

b. The Arkansas Code of Judicial Conduct Has Not Been Violated.

Petitioners have called Act 27 of 1987 an "administrative bill". The original "administrative bill" would have taxed *all* interstate long-distance telephone calls. (Pet. 3) However, the bill was amended three times. Petitioners have also alleged that AT&T lobbyists and legislative research personnel were

involved in the legislative process in Act 27. (Pet. 3, ftn. 1) Anyone can draft a bill, but they must get a sponsor and enough votes for it to pass.

The second point that petitioners make is that

> (2) the constitutionality of this Act has been defended by a political appointee within Governor Clinton's Executive Department; *Id.*

Petitioners brought this suit and named James C. Pledger, Commissioner of Revenues as a defendant. It is difficult to see the point made by petitioners, since defendants must defend or lose.

This case is no different than any other tax controversy involving the State of Arkansas. If the case is lost, the state will lose tax dollars. The relevance of statement 3, which appears on page 26 of the Petition, is questionable.

Petitioners have indicated that

> two of the special "appointed" justices' close family members had recently made substantial political contributions to Governor Clinton (which activity is prohibited by Canon 7A of the Code of Judicial Conduct).

Canon 7A (Pet. 48a) does *not* prohibit "close family members" from making political contributions to political parties, organizations or candidates.

Petitioners have not cited any precedent to support their implication that an individual cannot be appointed to serve as a special associate justice on more than one occasion within a given time frame. Justices have been appointed by Governor

Clinton in other cases in which the state has not prevailed. For instance, three justices were appointed in *Pledger, et al. v. Bosnick, et al.*, 306 Ark. 45, 811 S.W.2d 286 (1991), United States Supreme Court No. 91-375, Filed September 3, 1991, and the state was not the prevailing party. The three appointed justices joined one of the elected justices in the majority opinion. The three remaining elected justices dissented.

Article 7 § 9 of the Constitution of Arkansas provides the only constitutional method for the appointment of special judges. The Governor is to "commission the requisite number of men learned in the law to sit in the trial and determination of such cases." No other person or group of people (including the Supreme Court of Arkansas) is so authorized.

Petitioners asked the recusing justices to reconsider their recusals. Surely, the justices had a basis for their recusal, and it would be highly unlikely that it would change. Alternatively, petitioners asked the justices to state their reasons for recusal under Canon 3D of the Arkansas Code of Judicial Conduct —Remittal of Disqualification. Under Canon 3D a judge disqualified under Canon 3C(1)(c) or Canon 3(C)(1)(d) may disclose in the record his basis for disqualification. These deal with financial or other interests which could be substantially affected by the result of a case and personal or business relationships with parties, officers, directors or trustees of a party, etc. These do not include personal bias or prejudice; personal knowledge of the facts, etc. contained in 3C(a) or (b). Petitioners do not know why the justices disqualified themselves, and they are second guessing the justices by suggesting that there be a remittal of disqualifications.

Further, justices are not required to remit at the request

of a party (parties). The outcome of such remittance is also questionable since *all* lawyers and parties must agree, in writing, that the judge's relationship is immaterial or his financial interest is insubstantial.

The Code of Judicial Conduct does not require recusal merely because a party or lawyer alleges (1) the appearance of impropriety, or (2) independence or impartiality, as alleged by petitioners. In footnote 14, petitioners state, in pertinent part:

> . . . Canon 3 provides the general rule that a judge should disqualify in any proceeding where . . .. the question of impartiality or bias of a judge is raised;
>
> . . .

Where does Canon 3 state the above? Respondents are at a loss.

Do Canon 7 and the compliance provisions prohibit an attorney who might be considered for an appointment as a special justice from ever making a political contribution to a gubernatorial campaign or is the prohibition only when he is acting as a judge? If these innuendoes are carried to their logical conclusions, potentially absurd results would follow.

c. The Rule of Necessity is Applicable Here.

In footnote 16, Pet. 28, petitioners state that the rule of necessity [*United States v. Will*, 449 U.S. 200, 66 L.Ed.2d 392, 101 S.Ct. 471 (1980)] does not apply because several procedural methods for appointment exist.

The Constitution of Arkansas provides for one method of selecting special justices. If the governor is not permitted

to appoint justices, when elected justices recuse, in cases involving the State of Arkansas, who will hear the cases? Petitioners have not cited authority for the four alternatives suggested. (See Pet. 12 for the alternatives referred to by petitioners.) Since these cases must be heard and one method of appointment is constitutionally provided, the rule of necessity is applicable.

d. This Decision Does Not Conflict With Prior Decisions of This Court.

This factual situation is *not* "closely analogous to the one presented" in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580, Ann. 89 L.Ed.2d 1066 (1986), as alleged by petitioners.

In *Aetna, supra*, a justice of the Alabama Supreme Court had filed two actions against insurance companies, both alleging bad-faith failure to pay a claim, while a similar case was pending in the Alabama Supreme Court. One of the two cases involved insurance under a state employees' insurance plan, and all the justices of the Alabama Supreme Court were covered under this plan. The justice cast the deciding vote and authored the decision. Subsequent to that decision and while the request for rehearing was pending, Aetna learned of the other lawsuits.

Aetna filed two motions challenging the participation of the single justice and also alleging that all justices should recuse because of their interest as possible class members in the state employee health plan case. The justices refused to recuse, and, at the same time, also denied the motion for rehearing.

This Court decided *Aetna, supra*, on the basis that the

justice had "acted as a judge in his own case" and not on the basis of bias or prejudice. His interest was found to be "direct, personal, substantial [and] pecuniary". *Id.* Those facts are not present here.

The participation of the other justices did not require recusal under the Constitution. Further, this Court found that under the "rule of necessity," as set forth in *United States v. Will, supra,* none of these justices might have been required to disqualify. Even though these justices may have had some pecuniary interest, the Court "found it impossible" to characterize that interest as "direct, personal, substantial, [and] pecuniary". Likewise, the special justices here had no such interests.

The facts in *Tumey v. Ohio,* 273 U.S. 510 (1927); *In re Murchison,* 349 U.S. 133 (1955); *Ward v. Village of Monroeville,* 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); and *Gibson v. Berryville,* 411 U.S. 564 (1973) are also distinguishable.

This Court in *Gibson v. Berryville, supra,* was decided on the basis of personal interest, i.e. pecuniary interest. The individual members of the Board of Optometry would receive additional business if an optical company was forced to suspend operations due to its ruling.

In *Ward, supra,* a mayor who also had responsibilities for revenue production and law enforcement, convicted *Ward* of two traffic violations and fined him. The city benefitted substantially from these fines. *Tumey, supra,* involved a factual situation similar to *Ward, supra,* but the mayor in *Tumey* also received compensation from the fines he levied.

A judge presided at contempt proceedings after he had

served as a "one-man grand jury" out of which proceedings the contempt charge arose in *In Re Murchison, supra.*

Not a single case cited by petitioners has similar factual situations to this case. Respondents submit that the "unreasonable" questioning of impartiality by petitioners is not a basis for invoking the protections of the due process clause. This Court has very clearly enunciated the standards necessary for a fair trial under the Due Process Clause of the Fourteenth Amendment, and, as it said so well in *Aetna, supra,* at 89 L.Ed.2d 831-832:

> not "[a]ll questions of judicial qualification involve constitutional validity." . . . See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party"). But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Therefore, the due process arguments espoused by petitioners do not meet the requirements of Rule 10.1(c) of this Court, and the petition should be denied.

CONCLUSION

For the foregoing reasons, the Respondents submit that this Court should deny the Petition for a Writ of Certiorari to the Arkansas Supreme Court.

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